UNITED STATES COURT OF MILITARY COMMISSION REVIEW
***before* F. Williams, D. Conn, and C. Thompson**

	BRIEF ON BEHALF OF *AMICUS CURIAE* OFFICE OF THE CHIEF DEFENSE COUNSEL
	CMCR CASE NO. 09-001
UNITED STATES Appellee *v.*	Tried at Guantanamo, Cuba on 7 May 2008, 15 August 2008, 24 September 2008, 27 October – 3 November 2008
ALI HAMZA AHMAD SULIMAN AL BAHLUL Appellant.	Before a Military Commission convened by Hon. Susan Crawford Presiding Military Judge Colonel Peter Brownback, USA (Ret.) Colonel Ronald Gregory, USAF
	DATE: 15 October 2009

TO THE HONORABLE, THE JUDGES OF THE COURT OF MILITARY COMMISSION REVIEW

Col Peter R. Masciola, USAF-ANGUS
Chief Defense Counsel
Adam Thurschwell
General Counsel
Office of the Chief Defense Counsel
1099 14th Street NW, Suite 2000E
Washington, DC 20005
(202) 761-0645
Peter.Masciola@osd.mil

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Treatises

Constitutional Provisions

Other Authorities

ISSUES PRESENTED

1. Whether military commissions convened under the authority of the Military Commissions Act of 2006 constitute "regularly constituted courts" within the meaning of Common Article 3 of the Geneva Conventions.

2. Whether the failure of military commissions convened under the Military Commissions Act of 2006 to constitute "regularly constituted courts" renders the Act unconstitutional on its face.

INTEREST OF AMICUS CURIAE CHIEF DEFENSE COUNSEL

Amicus curiae is the Chief Defense Counsel for the Office of Military Commissions. He submits this brief as the authorized legal representative on behalf of an agency of the United States: the Office of the Chief Defense Counsel, Office of Military Commissions, Department of Defense. *See* CMCR Rule 16(a)(2).

The Chief Defense Counsel is a position created by the Military Commissions Act of 2006. 10 U.S.C. § 948k(d)(2). By regulation, he is charged with detailing military defense counsel to represent individual accused in military commission proceedings and supervising, facilitating, ensuring the qualifications and competence of, and evaluating the detailed defense counsel. (Regulation for Trial by Military Counsel ("RTMC"), §§ 9-1(a) and (b)(1); 9-3. He is also charged with ensuring the qualifications of civilian defense counsel to represent accused in commission proceedings. RTMC § 9-5(c).

More specifically, the Chief Defense Counsel is charged with the duties to "facilitate the proper representation of all accused referred to a trial before a military commission," RTMC § 9-1(a)(2); to "take appropriate measures to preclude defense counsel conflicts of interest arising from the representation of accused before military commissions," *id.*, § 9-1(a)(7); and to "take

appropriate measures to ensure that each defense counsel is capable of zealous representation, unencumbered by any conflict of interest." *Id*., § 9-1(a)(8).

In short, the Chief Defense Counsel is charged by law with ensuring, from the defense side, the proper functioning of the military commissions' system of criminal justice. By facilitating zealous, ethical advocacy on behalf of the accused, he ensures that the military commissions system itself functions as Congress intended it to, as a system that complies with the Rule of Law.

The issues raised in the brief – questioning whether the military commissions are "regularly constituted courts" within the meaning of Common Article 3 of the Geneva Conventions, and the constitutional implications of this issue – are of system-wide importance to the military commissions as a whole. These issues, moreover, are not squarely raised by the brief of the appellant. See CMCR Rule 16(a)(1). Accordingly, the Chief Defense Counsel requests that this Court accept and consider the instant brief *amicus curiae*.

SUMMARY OF ARGUMENT

Mr. al Bahlul is a citizen of Yemen. It is only because he is an alien that he is subject to trial by military commissions established under the Military Commission Act of 2006 ("MCA"). Were he a citizen of the United States, he would be tried in federal court, protected by a panoply of constitutional rights that are expressly denied under the MCA.

This distinction in the MCA's personal jurisdiction is illegal in two respects. First, it violates international law, as definitively interpreted by the Supreme Court. By virtue of its discrimination against aliens, MCA military commissions are not "regularly constituted courts" within the meaning of Common Article 3 of the Geneva Conventions. (Point I).

Second, the discrimination against aliens violates the constitutional constraints on Congress's power to authorize law-of-war military commissions. Congress is empowered to establish law-of-war military commission jurisdiction over war crimes by Constitution Article I, § 8, cl. 10, which permits Congress to "define and punish . . . Offenses against the Law of Nations." The limits of that power are determined by reference to the "Law of Nations," which, as explained under Point I, includes the requirement that military commissions be "regularly constituted courts." Thus, because military commissions convened under the MCA are not "regularly constituted courts," they exceed Congress's powers and are unconstitutional on that basis, apart from any individual rights held by Mr. Bahlul. (Point II).

ARGUMENT

At the outset, it is important to clarify that the Chief Defense Counsel does not maintain that all law-of-war military commissions are invalid. Military commissions are a valid and necessary instrument of warfare and an appropriate exercise Congress's war-making powers.

But like other aspects of warfare, they are subject to the constraints of the law of war and the Constitution. In limiting its jurisdiction to aliens alone, the MCA violates both.

It also violates an unbroken tradition of the United States military. The law of war applies equally to the United States and to its enemies, and thus to citizens as well as aliens. There has therefore never been a principled basis for distinguishing between war crime trial procedures for alien enemy combatants and citizen enemy combatants. And in fact, since before the Founding, the American military has consistently tried both alien and citizen enemy belligerents before the same law-of-war military commissions. That recognition of equality before the law was once a hallmark that distinguished the United States from its enemies. Thus, at the same time that the Supreme Court was holding, in the midst of World War II, that the citizen Haupt could be tried in the same law-of-war commission as his German confederates, *Ex parte Quirin*, 317 U.S. 1, 15-16 (1942), both Nazi Germany and Imperial Japan adopted the opposite principle and limited the jurisdiction of their own military tribunals to foreign nationals alone. *See Trial of Wilhelm Von Leeb and Thirteen Others (The German High Command Trial)*, 12 L. Rpts. of Trials of War Criminals 1, 37 (U.N. War Crimes Comm'n 1949) (Night and Fog Decree; limiting jurisdiction of tribunals to "criminal acts committed by non-German civilians."); *United States v. Shiguru Sawada, et al.*, Vol. 2 (1946) (military commission convened in Shanghai, China) (1946) (Statement of Itsuro Hata, at 1 (admitted into evidence at Tr. 153, attached to record following Tr. 154)) (limiting law-of-war tribunal jurisdiction to combatants "other than Japanese nationals").

Ironically, it is now the international community that takes the traditional American position and requires equal treatment of aliens and citizens in military tribunals as a fundamental principle of the law of war, while it is the United States that, against its own military tradition,

has adopted the opposite view in the MCA. This reversal not only violates the law of war, but exceeds Congress's power to authorize law-of-war military commissions, which is itself limited by the law of war. Accordingly, because the statute under which it was convened is facially unconstitutional, the military commission was without jurisdiction and the conviction must be reversed.

POINT I

MILITARY COMMISSIONS ESTABLISHED UNDER THE MCA ARE NOT "REGULARLY CONSTITUTED COURTS"

As recently as World War II, the law of war allowed unlawful enemy combatants to be summarily executed for violations of the law of war without trial. *See e.g. Trial of Wilhelm List and Others (The Hostage Trial)*, 8 L. Rpts. of Trials of War Criminals 34, 57 (U.N. War Crimes Comm'n 1948). That is no longer the case. Under the Geneva Conventions and customary international law, even unlawful combatants are entitled to trial procedures before they can be punished for war crimes. Common Article 3 of the Geneva Conventions of 1949 prohibits, in relevant part, "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples."

In *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), the Supreme Court held (a) that Common Article 3 is part of the "law of nations," *id*., at 631-2 (plurality); *id*., at 642-3 (Kennedy, J., concurring); (b) that the protections of Common Article 3 apply to trials of detainees held at Guantanamo, *id*., at 628-32; and therefore (c) that international law guarantees detainees charged with war crimes a trial before a "regularly constituted court." *Id*. Recognizing this requirement,

Congress declared in the MCA itself that its military commissions are "regularly constituted courts." 10 U.S.C. § 948b(f).

Congress's characterization of the legal status of its own statute does not and cannot control, however. It is the province of the judiciary, not Congress, to "say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). That judicial power applies equally to the interpretation of treaties, *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 353-4 (2006), including the Geneva Conventions.

Accordingly, it is the right and obligation of this Court, not Congress, to "say what the law is" with respect to the status of the MCA under international law norms and under Common Article 3 in particular. Most importantly for that determination, the Supreme Court in *Hamdan* provided a definitive interpretation of the requirements of Common Article 3 as applied to military commissions: "a military commission 'can be ''regularly constituted'' by the standards of our military justice system only if some practical need explains deviations from court-martial practice,'" *id*., at 632-3 (plurality; *quoting* Kennedy, J., concurring, *id*., at 645); *id*., at 645 (Kennedy, J., concurring).

Numerous provisions of the MCA attest to its failure to "afford[] all the judicial guarantees which are recognized as indispensable by civilized peoples," Common Article 3, ranging from the provisions contemplating the admissibility of statements obtained by cruel, inhumane or degrading treatment and unreliable hearsay, to its attempt to overcome the *Ex Post Facto* clause by statutory fiat. 10 U.S.C. §§ 948r(c), 949a(b)(2)(E), 950p. Many of these guarantees are embodied in Article 75 of Protocol I to the Geneva Conventions of 1949 (1977), which, according to the Supreme Court, further defines the meaning of "regularly constituted

court" in Common Article 3. *Hamdan*, 548 U.S. at 633. *See* Protocol I, Art. 75(4)(c), (4)(f) and (4)(g).[1]

Most significant, however, are the provisions that subject aliens alone to MCA jurisdiction, 10 U.S.C. §§ 948c, 948d(a) and (c). Prior to its amendment by the MCA, the UCMJ made no such distinction either under its regular "good order and discipline" jurisdiction or special law of war jurisdiction. *Compare* 10 U.S.C. §§ 948c, 948d(a) and (c) *with* 10 U.S.C. §§ 802, 803, and 817-821 (2005). The MCA's discrimination between aliens and citizens can therefore be justified only if "some practical need explains [these] deviations from court-martial practice.'" *Hamdan*, 548 U.S. at 632-3 (plurality; *quoting* Kennedy, J., concurring, *id*., at 645).[2]

There is no such "practical need," however. The Supreme Court long ago held that American citizens may be subjected to law-of-war military commission jurisdiction to the same extent as aliens. *Quirin*, 317 U.S. at 15-16. *Quirin* upheld the use of the military commission procedure against the American citizen Haupt as well as against his German confederates. *Id*., at 37-38; *see also Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004) ("There is no bar to this Nation's holding one of its own citizens as an enemy combatant."). Citizens are just as capable of joining al Qaeda as non-citizens, and "if released, would pose the same threat of returning to the front during the ongoing conflict." *Id., at* 519. That, indeed, is the lesson of the federal prosecutions of American citizens for criminal conduct that is indistinguishable from the conduct charged against accused in the military commissions. *See e.g. United States v. John Walker Lindh*, 227

[1] The United States has not ratified Protocol I but recognizes the guarantees of Article 75 as binding customary international law. *Hamdan*, 548 U.S. at 633 (plurality); Taft, "The Law of Armed Conflict After 9/11: Some Salient Features," 28 Yale J. Int'l L. 319, 321-2 (2003).

[2] Along with the "regularly constituted court" provision, the Act's distinction between aliens and citizens also violates the equal protection principle of Article 75, which guarantees that all persons "shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon . . . national or social origin." *See Hamdan*, 548 U.S. at 633 (plurality) (Article 75 an authoritative guide to Common Article 3).

F.Supp.2d 565 (E.D.Va. 2002) (the so-called "American Taliban" case); *United States v. Jose Padilla*, 2007 WL 1079090 (S.D.Fla. 2007) (the so-called "dirty bomber," tried on unrelated charges); "Long Island Man Helped Qaeda, Then Informed," *New York Times* (July 23, 2009), at p. A1 (describing case of Bryan Neal Vinas, who among other assistance to al Qaeda allegedly "tried to kill American soldiers in a Qaeda rocket attack against a military base" and who subsequently pleaded guilty in federal court).

Quirin's holding, moreover, is consistent with the unbroken history of American law-of-war military commissions, which, prior to enactment of the MCA – and fully consistent with court-martial practice – have never made a jurisdictional distinction on the basis of national origin, and have in fact tried American citizens as violators of the law of war. Indeed, Americans were tried before the Founding by what we would now call a law-of-war military commission. William Winthrop, MILITARY LAW AND PRECEDENTS, 2ND ED. ("Winthrop") 832 (1920)) (American Joshua Hett Smith tried in 1780 as a co-conspirator of Major John André in a "special court-martial" equivalent to a military commission); *see also* William Birkhimer, MILITARY GOVERNMENT AND MARTIAL LAW 351 (3rd ed. 1914), at ¶333. During the Mexican War, at least one American was tried by General Winfield Scott's "Councils of War" (the first full-fledged law-of-war military commissions, *see Hamdan*, 548 U.S. at 590). David Glazier, "Precedents Lost: the Neglected History of the Military Commission," 46 Va. J. Int'l L. 5, 37 (2005). During the next major episode of military commission use following the Civil War,[3] the Philippine insurrection that occurred in the wake of the Spanish-American War, three Americans

[3] The Civil War presents a special case because of the status of "citizenship" for enemy combatant purposes was complicated by the internal nature of the conflict, and because the military commissions employed by the Union included martial law, occupation and law-of-war jurisdiction in one forum. *Hamdan*, 548 U.S. at 590-1. Nevertheless, in Winthrop's list of the crimes subject to the Civil War military commission's specific law-of-war jurisdiction, a significant number apply to activities that involved "aiding the enemy" and similar conduct, which of necessity had to be committed by Union rather than Confederate citizens. Winthrop, *supra*, at 839-40.

were tried under the Philippine commissions' law of war jurisdiction. Glazier, "Precedents Lost," 46 Va. J. Int'l L. at 52. And, as *Quirin* demonstrates, the World War II commissions made no distinction between citizens and aliens.

In sum, at this juncture, it is indisputable that no "practical need explains the deviations," *Hamdan*, 548 U.S. at 632-3 (plurality); *id*., at 645 (Kennedy, J., concurring), between the MCA, which limits its jurisdiction to aliens, and court-martial jurisdiction, which does not. Military commissions established under the Act are therefore not "regularly constituted courts" within the meaning of Common Article 3.

POINT II

THE DEFINE AND PUNISH CLAUSE INCORPORATES THE LAW OF NATIONS, INCLUDING COMMON ARTICLE 3, AS A LIMIT ON CONGRESS'S POWER TO CONVENE LAW-OF-WAR MILITARY COMMISSIONS

Apart from violating the law of war, the MCA suffers from a closely related defect: it is a facially invalid exercise of the enumerated power that authorizes Congress to establish military commissions in the first instance. It is thus unconstitutional as well.

It is fundamental that Congress can "exercise only the powers granted to it" by the Constitution. *M'Culloch v. Maryland*, 17 U.S. 316, 404 (1819). That principle applies to Congress's war powers generally, *Lichter v. United States*, 334 U.S. 742, 779 (1948); *United States v. Robel*, 389 U.S. 258, 263 (1967), and to the establishment of military commissions in particular. *Hamdan*, 548 U.S. at 591; *Quirin*, 317 U.S. at 25; *Ex parte Milligan*, 71 U.S. 2, 121 (1866).

The Supreme Court has accordingly struck down statutes establishing military tribunal jurisdiction on *M'Culloch* grounds where they have exceeded the scope of the pertinent Article I,

§ 8 power. When Congress extended court-martial jurisdiction to former service members, the Court held that Congress's Art. I, § 8, cl. 14 power to "make Rules for the Government and Regulation of the land and naval forces" did not include the power to subject ex-service members to military jurisdiction. *United States ex rel. Quarles v. Toth*, 350 U.S. 11, 14-15 (1955). Similarly, when Congress attempted to bring the spouses of service members within the jurisdiction of courts-martial, the Court held that the clause 14 power "by its terms, limit[s] military jurisdiction to members of the 'land and naval Forces,'" and overturned the legislation. *Reid v. Covert*, 354 U.S. 1, 22 (1957) (plurality); *see also id*., at 67 (Harlan, J., concurring).[4]

Because commissions under the MCA are law-of-war military commissions, s*ee e.g.* 10 U.S.C. § 948b(a), the authority to establish them derives from the Define and Punish Clause, Art. I, § 8, cl. 10. *Hamdan*, 548 U.S. at 597 (Guantanamo commissions are law-of-war military commissions); *id*., at 601 (law-of-war commissions established under Define and Punish Clause); *Quirin*, 317 U.S. at 28; *In re Yamashita*, 327 U.S. 1, 7 (1946). Accordingly, when evaluating the constitutionality of the MCA, it is the scope of the Define and Punish Clause that determines its validity. *M'Culloch, supra*.

That scope is determined in the first instance from the text of the Constitution. Because the plain language of the Define and Punish Clause authorizes two powers – the power to "define" and the power to "punish" – each word must be given its full weight and evaluated individually. *Richfield Oil Corp. v. State Bd. of Equalization*, 329 U.S. 69, 77-78 (1946).

[4] Notably, in both *Reid* and *Covert*, the Court interpreted the scope of the Clause 14 power in light of the effect that the extension of jurisdiction would have on the affected persons' other individual constitutional rights, including their right to be tried before an Article III judge and jury and the procedural safeguards of the Bill of Rights. *Reid*, 354 U.S. at 22; *Quarles*, 350 U.S. at 15. Such individual rights are even more clearly sacrificed under the MCA.

The power to "punish . . . Offenses against the Law of Nations" therefore differs from the power to "define." Whereas the power to "define" limits Congress's definition of substantive crimes against "the Law of Nations," *see e.g. United States v. Arjona*, 120 U.S. 479, 488 (1887), the power to "punish" has a different focus, in that it necessarily incorporates the power to decide *who* to punish. The power to determine who should suffer punishment is a question of procedure, since no such determination can be made without some procedural guidance and limitations, whether of a trial-like nature or some other kind.[5] As in the case of the power to "define," moreover, it is clear from its plain language that the scope and limitations of such "punishment" procedures must be determined from "the Law of Nations." In sum, along with the limitations on the crimes Congress has the power to "define" under this clause, the Law of Nations similarly places limitations on the procedures established by Congress to determine who to "punish."

Apart from the Constitution's plain text, historical evidence from both before and after the Founding also demonstrates that the "Law of Nations" has long been understood to limit the procedures by which captured enemy combatants could be tried for war crimes. It is clear, for example, that General George Washington felt bound by the Law of Nations when he convened a special military board in September 1780 to determine whether Major John André, the traitor Benedict Arnold's British contact, was a spy. When the board recommended that André be sentenced to death, General Washington accepted its recommendation, but only after ensuring that the procedures – specifically, the means of punishment – conformed with the "practice and

[5] Indeed, it could not be otherwise. Without limits on Congress's power to select individuals to "punish" under the clause, punishment for war crimes could be applied indiscriminately, or determined through procedures that are patently offensive to civilized nations – through the rack and the screw, or worse. *See United States v. Furlong*, 18 U.S. 184, 198 (1820) (stating that there must be some limitation on the scope of Congress's power under the Define and Punish Clause; otherwise, "what offence might not be brought within their power . . .?").

usage of War." 20 *Writings of George Washington* 134 n.16 (J. Fitzpatrick, ed.) (1937) (rejecting André's request to be shot rather than hung because "the practice and usage of War were against his request"); Louis Fisher, *Military Tribunals and Presidential Power: American Revolution to the Present* 12-13 (2005); *Quirin*, 317 U.S. at 31 n.9. During the same period, the Continental Congress similarly acknowledged the limitations that the "law and usage of nations" imposed on its legislation. *See, e.g.*, Resolution of the Continental Congress, 1 Journ. Cong. 450 (21 August 1776) (reproduced at Winthrop, at 765) (authorizing trial of spies "according to the law and usage of nations"). The binding effect of the Law of Nations on the criminal process was similarly recognized in the early Republic. *See e.g,. Henfield's Case*, 11 F.Cas. 1099 (1793). *See generally* Beth Stephens, "Federalism and Foreign Affairs: Congress's Power to 'Define and Punish . . . Offenses Against the Law of Nations'," 42 Wm. & Mary L. Rev. 447, 463-477 (2000) (discussing acceptance of Law of Nations as binding at time of Founding and adoption of Define and Punish Clause).

In short, contemporaneous with the Founding, American law and military practice (as well as British law and practice) [6] all held that procedures afforded to unlawful enemy combatants were to conform to the Law of Nations.

Subsequent history confirms this understanding with regard to military commissions in particular. *See e.g.* United States Attorney General James Speed, "Military Commissions," 11 Atty. Gen. Op. 297, 298-9 (July 1865) (Define and Punish Clause the basis for establishing

[6] *See e.g.* Charles Clode, THE ADMINISTRATION OF JUSTICE UNDER MILITARY AND MARTIAL LAW 366-7 (2nd ed. 1874) (formal opinion of the King's Advocate, Attorney- and Solicitor-General, and Advocate and Counsel for the Admiralty, dated January 24, 1801, opining that, to determine procedures due prisoner of war charged with violating his parole (an offense against the law of war), "we conceive we ought to be able to refer either to some clear authority in the text writers upon the Law of Nations, or to some more uniform practice in the conduct of nations which would fully justify the proceeding"); *see also* 4 William Blackstone, Commentaries *66 ("The law of nations is a system of rules . . . established by universal consent among the civilized inhabitants of the world; in order to decide all disputes, to regulate all ceremonies and civilities, and to insure the observance of justice and good faith").

military commissions); *id*., at 300 ("When war is declared, it must be, under the Constitution, carried on according to the known laws and usages of war among civilized nations. Under the power to define these laws, Congress cannot abrogate them or authorize their infraction."); *United States v. Reiter*, 27 F.Cas. 768, 769 (No. 16,146) (La. Provisional Ct. 1865) (provisional court's jurisdiction "depends for its existence on the law of nations, and on that part of the law of nations relating to war"). The Supreme Court's most recent cases on military commissions similarly suggest that the law of war exerts an independent force on the constitution and jurisdiction of commissions. *Hamdan*, 548 U.S. at 598-613; *Yamashita*, 327 U.S. at 18-20 (considering applicability of 1929 Geneva Convention); *Quirin*, 317 U.S. at 27-36; *Madsem v. Kinsella*, 317 U.S. 341, 354-5 (1952).

In sum, since before the Founding, it has been clear that Congress's power to establish procedures for trying and punishing individuals charged with "offenses against the Law of Nations" is limited by the same "Law of Nations" that limits Congress's authority to define these offenses.

Finally, as explained in Point I, *supra*, it is clear that the MCA's jurisdictional limitation to aliens violates "the Law of Nations." Pursuant to the preceding analysis, then, the MCA is unconstitutional as well, because legislation that includes such a provision not only violates international law, it lies beyond Congress's constitutional power to authorize law-of-war military commissions in the first instance.

CONCLUSION

Accordingly, because its personal jurisdiction provision is unconstitutional, no person, citizen or alien, may lawfully be tried under the MCA. A statute that is unconstitutional in all its applications is void on its face. *Washington State Grange v. Washington State Republican Party*, — U.S. —, 128 S.Ct. 1184, 1190 (2008). The MCA is therefore unconstitutional on its face, the military commission that tried Mr. al Bahlul was constitutionally *ultra vires*, and Mr. al Bahlul's conviction should be overturned.[1]

Col Peter R. Masciola, USAF-ANGUS
Chief Defense Counsel
Adam Thurschwell
General Counsel
Office of the Chief Defense Counsel
1099 14th Street NW, Suite 2000E
Washington, DC 20005
(202) 761-0645
Peter.Masciola@osd.mil

Dated: 15 October 2009

[1] Nor can the jurisdictional limitation be severed from the remainder of the statute, first, because personal jurisdiction is a general prerequisite to subjection to the remainder of the MCA's procedures and rules, and second, because it is abundantly clear on the face of the law and from the legislative record that Congress would not have passed the MCA without the limitation of its procedures to aliens alone. *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 560 (2001); *see e.g.* 152 Cong. Rec. S10,250 (statement of Sen. Warner) (reassuring Congress that Act applies only to aliens); *id.* at S10,251 (statement of Sen. Graham) (same).

CERTIFICATE OF COMPLIANCE WITH RULE 14(I)

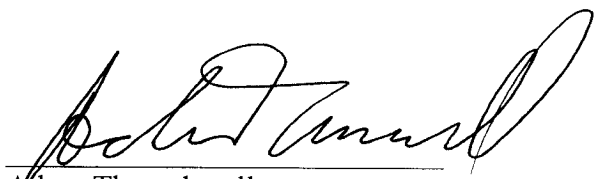
1. This brief complies with the type-volume limitation of Rule 14(i) because:

This Brief contains 3,569 words.

2. This brief complies with the typeface and type style requirements of Rule 14(e) because:

This brief has been prepared in a monospaced typeface using Microsoft Word Version 2000 with 12 characters per inch and Times New Roman Font.

Dated: 15 October 2009

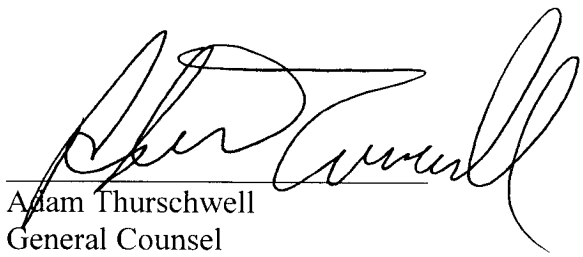


Adam Thurschwell
General Counsel
Office of the Chief Defense Counsel
1099 14th Street NW, Suite 2000E
Washington, DC 20005
(703) 588-0437
Adam.Thurschwell@osd.mil

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was sent via e-mail to CAPT Edward White and Mr. Michel Paradis on the 15th day of October 2009.

Dated: 15 October 2009



Adam Thurschwell
General Counsel
Office of the Chief Defense Counsel
1099 14th Street NW, Suite 2000E
Washington, DC 20005
(703) 588-0437
Adam.Thurschwell@osd.mil